ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JOHN MAUZY PITTMAN, CHIEF JUDGE

DIVISION I

CA06-1207

August 29, 2007

BRAD STUMON

APPELLANT

APPEAL FROM THE HOT SPRING COUNTY CIRCUIT COURT [NO. DR-2004-89-2]

V.

HON. PHILLIP H. SHIRRON, JUDGE

KATRINA YATES

APPELLEE

AFFIRMED

This is an appeal from a custody decision involving an illegitimate seven-year-old girl. Appellant father established paternity, and appellee was granted custody. Approximately eighteen months later, appellant moved for a change of custody, alleging that circumstances had changed in that the child was failing a class in school and the mother was behaving in an immoral and unstable manner. The trial court denied his motion and, on appeal, he argues that the trial court clearly erred in so doing. We affirm.

Arkansas Code Annotated section 9-10-113(a) (Supp. 2005) provides that an illegitimate child shall be in the custody of its mother unless a court of competent jurisdiction

enters an order placing the child in the custody of another party. *Sheppard v. Speir*, 85 Ark. App. 481, 157 S.W.3d 583 (2004). Section 9-10-113(b) provides that a biological father may petition the court for custody if he has established paternity in a court of competent jurisdiction. *Id.* Custody may be awarded to a biological father upon a showing that: (1) he is a fit parent to raise the child; (2) he has assumed his responsibilities toward the child by providing care, supervision, protection, and financial support for the child; and (3) it is in the best interest of the child to award custody to the biological father. Ark. Code Ann. § 9-10-113(c) (Supp. 2005). In addition to the three factors enumerated in section 9-10-113(c), the father of an illegitimate child must show a material change of circumstances. *Norwood v. Robinson*, 315 Ark. 255, 866 S.W.2d 398 (1993).

The trial court's findings in a child-custody case will not be reversed on appeal unless they are clearly against the preponderance of the evidence, and since the preponderance of the evidence turns largely on the credibility of the witnesses, the appellate court defers to the superior position of the trial judge. *Clark v. Reiss*, 38 Ark. App. 150, 831 S.W.2d 622 (1992). In child-custody cases, a heavier burden is cast upon the trial judge to utilize to the fullest extent all of his powers of perception in evaluating the witnesses, their testimony, and the children's best interest. *Id*.

We find no clear error. No good purpose would be served by a detailed recitation of the evidence. It is sufficient to note that, although appellant offered evidence that appellee mother was no exemplar of morality, he failed to show that this constituted a change of

circumstances from those existing at the time of the initial custody order. With respect to the allegation that the child was failing in school, the evidence reflects that this was one particular class with which the child was having difficulty and her overall grades were very good.

The facts of this case do not reflect well on either of the parents. There is a class of cases where neither parent is especially fit and the trial court's decision is a difficult one; Judge Cracraft discussed this in *Respalie v. Respalie*, 25 Ark. App. 254, 257, 756 S.W.2d 928, 930 (1988):

> Chancellors cannot always provide flawless solutions to unsolvable problems, especially where only limited options are available. Although the conditions in which these children are placed are not ideal, we cannot conclude that the chancellor's order does not more adequately provide for the welfare of these children than any option then available to him.

We hold that the trial court did not clearly err in finding that appellant failed to establish a change of circumstances.

Appellant's remaining argument, that the trial court erred in changing visitation *sua sponte*, is flawed because the appellee did in fact request an adjustment in visitation. In any event, appellee's move to a town on the Missouri border made the current visitation schedule impractical.

Affirmed.

HART and MILLER, JJ., agree.